

¹ Neither party requested Board review of that post-award order.

reasonable fee should be determined to be \$125 per hour. Respondent further argues that the mileage expenses incurred by claimant's attorney is not a cost to be awarded pursuant to K.S.A. 44-510k(c).

Claimant's attorney argues that the ALJ's Order awarding attorney fees and expenses should be affirmed but the determination of a reasonable hourly attorney fee should be modified to an hourly rate of \$250. And the claimant's attorney requests fees for an additional 3.5 hours to review the record and prepare a brief for Board review.

The issues for Board determination are whether claimant's attorney should be awarded post-award attorney fees and mileage expenses. If so, what is the reasonable and customary hourly rate for a similarly situated attorney in her locale. Finally, whether claimant's attorney should be awarded additional attorney fees for preparing and submitting a brief to the Board for this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a work-related accidental injury on December 4, 2001, when his head was crushed and driven into the motor frame of a bulldozer. Claimant suffered facial fractures which resulted in surgical insertion of four steel plates.

Before the accident the claimant had a full upper denture (no natural teeth) and his lower jaw had eight natural teeth with six in front and two on the left. Claimant had a removable partial denture on his right lower jaw and a permanent partial bridge on his left lower jaw. The accident broke teeth out of the upper denture and the right removable partial denture was so badly bent that it was unusable. The claimant's left lower bridge broke the top of the tooth it was attached to and all the porcelain on the bridge was broken off. Four of claimant's front teeth in his lower jaw were also loosened.

Claimant was provided a new upper denture as well as a new lower removable partial denture in February 2002 by Dr. Robert Ruwwe. It was agreed that claimant would wait to see if the loosened teeth would tighten up without further treatment. Apparently, there were no repairs made to the claimant's left lower bridge.

As time passed one of claimant's six front teeth got so loose that claimant pulled it. And of the four that were loosened one tightened back, two remain marginal and claimant could still move one. Claimant returned to Dr. Ruwwe in May 2005, and a treatment plan was developed. The plan provided for replacement of claimant's upper denture which had become loose fitting as well as a new bridge on the lower left quadrant and additional work on the lower removable partial denture. Two lower front teeth were to be extracted.

As previously noted, on June 27, 2005, claimant settled his claim with respondent but reserved the right to future medical treatment as well as review and modification. On August 10, 2005, claimant's attorney sent respondent's attorney a letter requesting respondent to authorize dental treatment with claimant's personal dentist, Dr. Ruwwe. On September 9, 2005, claimant then filed an application for post award medical. A post-award hearing was scheduled but apparently continued when claimant was sent by respondent to Dr. Paul Hanson for a second opinion.

On March 15, 2006, Dr. Hansen recommended claimant have implants to secure his dentures and respondent authorized this treatment but the doctor had relocated so respondent then agreed that Dr. Ruwwe could provide treatment but he was directed to follow the treatment plan developed by Dr. Hanson.

Dr. Ruwwe testified that the plan developed by Dr. Hanson included three options so he called the insurance carrier's claims representative to determine which option he was authorized to provide and was told to provide the best one. Dr. Ruwwe then developed a plan on July 18, 2006, to remove teeth and replace all the missing teeth with implants and prosthesis. Dr. Ruwwe described this as providing four implants on the upper jaw and then make an implant supported complete denture. On the lower jaw five teeth were to be extracted with placement of eight implants with crowns on the implants with a bridge. When this plan was submitted to the insurance carrier, including the estimated cost, the claims representative withdrew Dr. Ruwwe's authorization to proceed with the treatment.

Respondent then referred claimant to Dr. Christopher Cumming who performed a cursory examination of claimant on December 11, 2006. Dr. Cumming recommended that claimant's remaining permanent teeth be pulled and replaced with a full lower denture without implants which was the least expensive treatment option.

Because of the diverse opinions regarding the appropriate treatment options, the ALJ sent claimant to Dr. W. Stuart Dexter for an independent medical examination. Dr. Dexter recommended extraction of claimant's teeth with placement of implants to support dentures. The ALJ ultimately adopted Dr. Dexter's recommendations for claimant's dental treatment.

Initially, respondent argues that claimant's attorney is not entitled to post-award attorney fees because dental treatment was recommended before the claim was settled and there has been no change of circumstance in claimant's condition. This argument is based upon language and findings in the *Naff*² case.

Under K.S.A. 44-536(g), the Judge can assess attorney fees against an employer and its insurance carrier for the legal services rendered an injured worker to obtain

² *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738, rev. denied 271 Kan. 1037 (2001).

additional medical treatment following a final award. But K.S.A. 44-536(g) must be considered in light of the *Naff* decision. In *Naff*, the Court of Appeals held that under the facts presented in that particular case, an injured worker was not entitled to an award of attorney fees where medical treatment that was being sought following a final award was actually recommended before the final award was entered. The Court stated, in part:

In this case, the Board was attempting to stop an apparent abuse of the workers compensation system. Instead of pursuing the medical treatment recommended by Dr. Ketchum in June of 1996, Naff proceeded to regular hearing claiming her condition was at maximum medical improvement. She received an award for permanent disability to both her arms and shoulders. Yet, a short time after receiving her award, she decided to pursue the surgery recommended prior to the award.

We recognize Naff's statutory argument concerning the elements of K.S.A. 44-536(g). However, we hold that in a case where medical treatment being sought was recommended prior to the issuance of the original award and the employee choose [sic] not to pursue that medical treatment, it is proper for the Board to require a change in circumstances of the employee's injuries in order to award attorney fees under K.S.A. 44-536(g). Any attorney fees associated with challenging the extent of medical compensation prior to the original award would not have been compensable under these facts. The Board properly recognized that immediately reopening the question, right after the disability determination award for no discernable reason, should not give rise to the awarding of attorney fees under our statutory setup.

Under the facts of this case, we hold the Board did not err in requiring a change in circumstances in order for the attorney to receive attorney fees under K.S.A. 44-536(g).³

The Board concludes that *Naff* is distinguishable from this claim. In *Naff*, the Board was attempting to prevent an abuse of the workers compensation system. Conversely, in this claim the Board finds that claimant's request for additional medical treatment and post-award attorney fees does not constitute an attempt to abuse the system. The Board finds that when this claim was settled, there was a suggested dental treatment plan proposed by claimant's dentist and, unlike *Naff*, the claimant had not declined the treatment but had instead sought authorization from respondent, as he had been directed to do at the settlement hearing. That led to a series of examinations and changes to the originally proposed treatment. Because of the dispute over which treatment plan was appropriate the matter then proceeded to hearing. Accordingly, *Naff* is distinguishable for two reasons: first, claimant is not attempting to abuse the workers compensation system, and second, the circumstances changed following settlement of the claim as Drs. Ruwwe, Hanson and Dexter then determined claimant's condition was such that it was appropriate to proceed

³ *Naff* at 732-733.

with removal of all of claimant's teeth and the placement of implants. All of which was a change from the original plan suggested by Dr. Ruwwe before the claim was settled. Accordingly, the Board affirms the ALJ's Order that claimant's attorney is entitled to post-award attorney fees.

Respondent next objects to the ALJ's determination that \$150 per hour was a reasonable hourly rate. No objection was raised regarding the number of hours claimed. The only objection is to the hourly rate awarded. K.S.A. 44-536 allows post-award attorney fees to be awarded by the Director on the "basis of the reasonable and customary charges in the locality for such services. . . ." ⁴ While respondent requests that the hourly rate be reduced to \$125 per hour, the respondent provided no evidence regarding what rate would be reasonable or customary in the Kansas City area or even in Kansas. Claimant's attorney noted that she would not have appealed the ALJ's determination of the hourly rate but since respondent raised the issue she argues in her brief that an hourly rate of \$250 more closely approximates her effective \$300 hourly rate based upon the benefits received on her contingency cases divided by the time spent to obtain those benefits. The Kansas Supreme Court has held that the administrative law judge is an expert when determining what is a reasonable and customary fee. ⁵ The ALJ found that an hourly fee of \$150 was reasonable and customary. The Board agrees and affirms.

Respondent next argues it was improper for the ALJ to award mileage expenses. K.S.A. 44-536 makes no mention of expenses when discussing attorneys fees. However, K.S.A. 44-510k(c) does allow for the awarding of costs when post-award litigation occurs on claimant's behalf. "Costs" as described by that statute are defined as including,

[B]ut are not limited to, witness fees, mileage allowances, any costs associated with the reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

The language of K.S.A 44-510k(c) indicates that the list is not all inclusive and the Board has concluded that such things as attorney travel expenses including mileage, as specifically provided in the statute, may be considered as appropriate "costs." Accordingly, the Board finds that the mileage expenses may be awarded to claimant's attorney and affirms the ALJ.

Although claimant's counsel submitted an itemization, attached to her brief to the Board, that she spent an additional 3.5 hours in the preparation of her appeal materials, the Board refuses to consider that exhibit. The Board can only consider those issues and evidence submitted to the ALJ. Claimant's attorney's request for additional fees for the

⁴ K.S.A. 44-536(g).

⁵ See *City of Wichita v. B G Products, Inc.*, 252 Kan 367, Syl. ¶ 2, 845 P.2d 649 (1993).

legal services rendered in this appeal should be presented to the ALJ after proper notice to afford respondent and its insurance carrier an opportunity to address that request.

AWARD

WHEREFORE, it is the decision of the Board that the Order of Administrative Law Judge Steven J. Howard dated February 8, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Burkhead, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge